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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KESHBAF KNITTING, INC.,

Plaintiff and Respondent,

v.

OMID SHOSHANI,

Defendant and Appellant.

B204935

(Los Angeles County  
Super. Ct. No. BC331499)

APPEAL from an order of the Superior Court of Los Angeles County, Mary Ann Murphy, Judge. Affirmed.

Law Offices of Eric Anvari and Eric Anvari for Defendant and Appellant.

Zakariaie & Zakariaie, Jack M. Zakariaie and Nilou A. Zakariaie for Plaintiff and Respondent.

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A creditor sued a debtor in the trial court. They resolved their differences through a stipulation that established a payment schedule and provided for the entry of judgment in a predetermined amount in the event of a default. The debtor defaulted, and the trial court entered judgment in accordance with the stipulation.

The debtor moved to set aside the judgment on the primary ground that the amount of the judgment did not bear a reasonable relationship to the creditor's actual damages and therefore constituted an invalid penalty. The trial court rejected that argument and denied the motion.

We too conclude that the amount of the judgment was reasonably related to the actual damages incurred by the creditor, such that the stipulated judgment is valid. We therefore affirm.

## **I**

### **BACKGROUND**

On April 7, 2005, plaintiff Keshbaf Knitting, Inc. (Knitting), filed suit against Omid Shoshani and others, alleging that defendants owed Knitting a balance of \$56,845.20 arising out of their purchase of textiles, as memorialized in a series of written agreements between the parties. The agreements included a provision for interest and attorney fees. The complaint asserted causes of action for breach of contract, open book account, account stated, and "dishonored checks" (Civ. Code, § 1719). Knitting sought the unpaid balance (\$56,845.20), damages for dishonored checks (\$6,000), and an unspecified amount of interest and attorney fees.

On March 28, 2007, Knitting filed a "Stipulation for Entry of Judgment" (Stipulation) executed by Shoshani on October 19, 2005. The Stipulation recited that the principal owed was \$53,000. A payment schedule was set forth. If Shoshani defaulted on any of the payments, then judgment "shall be entered" against him for \$60,000. If Shoshani made all of the payments without default, the Stipulation would not be filed. Shoshani waived notice of (1) the default and an opportunity to cure, (2) the granting or entry of judgment, (3) application for issuance of a writ of execution, and (4) execution upon a judgment. Shoshani also waived the right to request a new trial, to move that the

Stipulation be vacated, and to appeal from the Stipulation or judgment. The Stipulation contained a clause entitling Knitting to recover costs, including reasonable attorney fees, in the event the company had to retain counsel “to enforce any rights . . . under this stipulation for entry of Judgment, or the Judgment.”

In support of the Stipulation, the president of Knitting submitted his declaration, stating that in October 2005, the parties settled the underlying dispute — the one described in the complaint — by way of the Stipulation. As of December 1, 2006, Shoshani had paid \$7,200 toward the debt. Under the Stipulation, however, he should have paid \$26,000. Although the Stipulation dispensed with notice of default, Knitting’s attorney mailed and faxed a letter to Shoshani’s attorney on August 8, 2006, asking Shoshani to cure the default. No response was forthcoming. Together with the Stipulation, Knitting’s attorney filed a declaration stating he had spent three hours of time on the matter and requesting \$1,050 in attorney fees. Costs totaled \$481.30.

On March 28, 2007, the trial court entered judgment for \$61,531.30.

On September 26, 2007, Shoshani filed a motion to vacate the judgment. In his memorandum of points and authorities, Shoshani began by stating that, when Knitting filed the Stipulation and supporting papers, the trial court signed the judgment without sufficient time to review the material. Shoshani then requested that the trial court set aside the “void judgment.” (Code Civ. Proc., § 473, subd. (d).)

In his motion, Shoshani presented three main arguments. First, the Stipulation and resulting judgment constituted an illegal forfeiture because the \$60,000 judgment was disproportionate to the principal debt (\$53,000) and did not take into account Shoshani’s prior payments of \$7,200. According to Shoshani, he had been penalized in the amount of \$14,200 for failing to make a timely payment. Second, the Stipulation did not allow Knitting to recover attorney fees or costs, but the trial court awarded them. Third, the trial court should exercise its equitable power to set aside the judgment on the ground of extrinsic fraud because (1) in obtaining the judgment, Knitting did not reduce the stipulated \$60,000 by the \$7,200 previously paid; (2) the Stipulation did not provide for the recovery of attorney fees or costs; (3) the award of attorney fees was exorbitant; and

(4) Knitting requested a judgment of \$60,000 notwithstanding that the amount originally due under the Stipulation was \$53,000.

Knitting filed opposition papers, disputing each of Shoshani's contentions. Shoshani filed a reply, emphasizing that the Stipulation should be analyzed under the principles applicable to settlement agreements.

Shoshani's motion was heard on November 8, 2007. At the outset, the trial court asked his attorney to explain the statement in the moving papers that the trial court had signed the stipulated judgment without having had sufficient time to review the matter. The attorney essentially conceded he had no "good faith" basis for making the statement. The parties' counsel proceeded to address the validity of the judgment. At the end of the hearing, the trial court denied the motion to vacate. An order was entered to that effect. Shoshani appealed.

## II DISCUSSION

"Because this appeal involves the application of legal principles to undisputed facts, we review the trial court's decision de novo." (*State Farm Mutual Automobile Ins. Co. v. Superior Court* (2003) 114 Cal.App.4th 434, 439.) The de novo standard is particularly appropriate where a party argues that a judgment is void. (See *Iloff v. Dustrud* (2003) 107 Cal.App.4th 1201, 1206–1207; *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495–496.) Even assuming that an abuse of discretion standard applies to some or all of the trial court's ruling (see *Parage v. Couedel* (1997) 60 Cal.App.4th 1037, 1041), we would still reach the same result.

As a preliminary matter, Knitting argues that Shoshani may not appeal the trial court's decision because the Stipulation precludes an appeal. "A party may expressly waive the right to appeal from any judgment." (*Pratt v. Gursey, Schneider & Co.* (2000) 80 Cal.App.4th 1105, 1108.) Even so, Knitting cites no authority for the proposition that such a waiver is valid where one of the parties has allegedly used a stipulation to obtain a void judgment or has engaged in extrinsic fraud. We therefore reach the merits of the appeal.

## A. Liquidated Damages

“Under California law liquidated damages not reasonably related to actual damages are unenforceable and void as penalties.” (*Sybron Corp. v. Clark Hosp. Supply Corp.* (1978) 76 Cal.App.3d 896, 900; see generally Civ. Code, §§ 1671, 3275.) In *Sybron*, the parties settled a dispute for a total of \$72,000 to be paid in 12 monthly installments, plus monthly interest on the unpaid balance at 10 percent. The settlement contained a provision authorizing the entry of a \$100,000 judgment in the event of a default in payment. After making payments totaling \$42,000, the debtor defaulted. The creditor obtained judgment as provided by the settlement.

The Court of Appeal reversed, stating: “We think the penalty at bench bears no reasonable relationship to actual damages suffered by [the creditor] as the result of delay but to the contrary appears grossly disproportionate in amount. Certainly there is paperwork and time involved in the collection of an installment obligation. The creditor is entitled to bargain that if the installment debtor imposes upon the creditor by a continuing course of dilatory payment the creditor may accelerate and collect the entire obligation, plus a reasonable amount to compensate for delay. On the other hand, the equitable powers of the court exist to insure that the ultimate obligation imposed on the debtor is not unreasonable *in proportion* to the original obligation and the seriousness of the default. . . . At bench, enforcement of the default provisions under the 1975 agreement would result in a \$28,000 penalty for delay in payment of \$30,000, a penalty which bears no rational relationship to the amount of actual damages suffered by [the creditor]. Such an agreement is unenforceable.” (*Sybron Corp. v. Clark Hosp. Supply Corp.*, *supra*, 76 Cal.App.3d at p. 903.)

Our Supreme Court has also addressed this issue, explaining: “California law has . . . long recognized that a provision for liquidation of damages for contractual breach — for example, a preset late payment penalty — can under some circumstances be designed as, and operate as, a contractual forfeiture. . . .

“A liquidated damages clause will generally be considered unreasonable, and hence unenforceable . . . , if it bears no reasonable relationship to the range of actual damages

that the parties could have anticipated would flow from a breach. The amount set as liquidated damages ‘must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained.’ . . . In the absence of such relationship, a contractual clause purporting to predetermine damages ‘must be construed as a penalty.’ . . . ‘A penalty provision operates to compel performance of an act . . . and usually becomes effective only in the event of default . . . upon which a forfeiture is compelled without regard to the damages sustained by the party aggrieved by the breach . . . . The characteristic feature of a penalty is its lack of proportional relation to the damages which may actually flow from failure to perform under a contract. . . .’ . . .

“In short, ‘[a]n amount disproportionate to the anticipated damages is termed a “penalty.” A contractual provision imposing a “penalty” is ineffective, and the wronged party can collect only the actual damages sustained.’ . . . ‘[A]ny provision by which money or property would be forfeited without regard to the actual damage suffered would be an unenforceable penalty.’ . . .” (*Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 976–978, citations omitted.)

The high court continued: “‘A liquidated damages provision is not invalid merely because it is intended to encourage a party to perform, so long as it represents a reasonable attempt to anticipate the losses to be suffered.’ . . . But . . . the charge of six months’ interest on the entire principal, imposed for any late payment or other default, cannot be defended as a reasonable attempt to anticipate damages from default. Under these circumstances, however the charge is formally characterized, it is, in substance, an unenforceable penalty for late payment. ‘If the sum extracted from the borrower is designed to exceed substantially the damages suffered by the lender, the provision for the additional sum, whatever its label, is an invalid attempt to impose a penalty inasmuch as its primary purpose is to compel prompt payment through the threat of imposition of charges bearing little or no relationship to the amount of the actual loss incurred by the lender.’” (*Ridgley v. Topa Thrift & Loan Assn.*, *supra*, 17 Cal.4th at p. 981.)

Here, the complaint sought \$56,845.20 in principal, plus interest for more than two years, that is, around \$14,000. In addition, the damages for dishonored checks allegedly

totaled \$6,000. The complaint also sought attorney fees and costs. At a minimum, Knitting's original suit sought more than \$76,000.

The Stipulation reduced the outstanding principal to \$53,000 and provided for a stipulated judgment of \$60,000 upon default. The Stipulation also expressly authorized attorney fees (\$1,050) and costs (\$481.30) that were incurred in enforcing the Stipulation. Thus, the judgment that was ultimately entered — \$61,531.30 — was “reasonably related to actual damages.” (*Sybron Corp. v. Clark Hosp. Supply Corp.*, *supra*, 76 Cal.App.3d at p. 900.) This is true even if Shoshani's uncredited prior payments of \$7,200 are taken into account. The amount he must pay under the judgment, *plus* the prior payments — a total of \$68,731 — is still *less* than what he owed under the complaint — at least \$76,000. Consequently, it cannot be said that the judgment, together with the earlier payments, “bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach.” (*Ridgley v. Topa Thrift & Loan Assn.*, *supra*, 17 Cal.4th at p. 977.) Rather, the amount Shoshani must pay, including what he has already paid, “represents a reasonable attempt to anticipate the losses to be suffered.” (*Id.* at p. 981.)

Shoshani poses an interesting hypothetical, but it is nothing more. What would a court do if he had paid all but the last \$1,000 of the \$53,000 and then defaulted? In that situation, would the court find that an additional \$61,531 was invalid? This question, however, is not before us because at the time Shoshani defaulted, a credit for the \$7,200 already paid would still leave him owing over \$68,000 of the \$76,000 originally sought. Shoshani cites no authority that compels us to ignore the actual circumstances of the case, as opposed to a hypothetical, in determining whether there has been an unlawful forfeiture.

## **B. Extrinsic Fraud**

Shoshani's contention of extrinsic fraud, which he also calls “fraud upon the court,” is baseless as a matter of law. Everything to which he refers as fraud — for example, the amount of the prior payments, the awarding of costs and attorney fees, and the entry of a \$60,000 judgment even though the stated principal was \$53,000 — was disclosed to the

trial court, in either the Stipulation or the supporting papers. There was no fraud, extrinsic or otherwise.

**C. Settlement Agreement**

Shoshani emphasizes that the Stipulation is a settlement agreement — a contract — and that illegal contracts, like void judgments, are not enforceable. (See *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1126–1128.) While we have no quarrel with this principle, Shoshani’s illegal contract argument fails for the same reason as his attack on the Stipulation and judgment. As we have explained, the Stipulation did not constitute or result in an excessive forfeiture or an improper penalty.

**D. Cost and Attorney Fee Procedures**

The Stipulation expressly stated that Knitting was entitled to attorney fees and costs incurred in enforcing rights under the Stipulation and any resulting judgment. The trial court awarded fees for only three hours of work and at a reasonable hourly rate. Costs were awarded for the filing fee and service of process.

Shoshani has failed to show that the alternative use of the statutory cost bill procedure (see Code Civ. Proc., § 1032 et seq.) or the use of a formal motion to determine the amount of attorney fees (see *id.*, § 1033.5, subd. (c)(5)) would have made any difference in the result. Without a showing of prejudice, his arguments are of no consequence. (See Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.)



**III**  
**DISPOSITION**

The order is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

WEISBERG, J.\*

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\* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.